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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees*

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

BRIEF OF RAILROAD APPELLEES

ED WHITE
280 Union Station Building
517 West Adams Street
Chicago, Illinois 60606
Attorney for Railroad Appellees

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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BRIEF OF RAILROAD APPELLEES

QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission have power to grant an application for temporary authority in violation of the minimum requirements and standards of its own rules and regulations implementing 49 U.S.C. 310a(a), and where neither condition imposed by the statute has been shown to exist, especially where the sole support-

ing shipper acknowledged there is already sufficient and satisfactory service?

2. Did the Interstate Commerce Commission have authority to reassert its jurisdiction and reopen its proceeding as to precisely the same issue as was being judicially reviewed without obtaining leave of the reviewing court?

STATEMENT OF THE CASE

These Railroad Appellees, named in the Appendix, believe that the Solicitor General's statement of the case gives a generally accurate and concise background of this litigation. For the purpose of this Brief, they adopt it.

They further believe that the statement of appellant American Farm Lines (AFL) omits significant background and contains matter of doubtful relevance to such an extent as to be of little value.

SUMMARY OF ARGUMENT

To enable the provision of motor carrier service, the Interstate Commerce Commission (Commission) may grant temporary authority, but only if it is demonstrated (1) there is an immediate and urgent need and (2) there is no carrier service capable of meeting such immediate and urgent need. 49 U.S.C. 310a(a). This proviso was added to the Motor Carrier Act in response to the Commission's request that it be empowered to cope with emergency situations.

In 1965 the Commission adopted implementing rules and regulations, 49 C.F.R. 1131, et seq., to govern the filing, processing and determination of applications. They are couched in terms of command.

AFL, an agricultural cooperative association judicially determined to have operated common carrier trucking serv-

ice for the government in violation of the Interstate Commerce Act, applied for temporary authority to transport commodities generally when moving on government bills of lading between all points in exceedingly broad areas.

The sole supporter was the Department of Defense (DOD), which had conceded it could make no contention that there would be insufficient or inadequate service without AFL. DOD expressed the desire to have AFL to render a complete, single-line service, to haul every known commodity between thousands of combinations of points, a type of service not contemplated by the Commission's rules. Its initial letter of support clearly failed to comply with the minimum requirements set forth in the rules, and this was later conceded by the Commission and the Solicitor General. It made no representation respecting immediate or urgent need. It claimed no emergency. DOD had used the services of AFL conducted under the claimed protection of 49 U.S.C. 303(b)(5), considered them to be desirable, and here supports their continuation. But much of the service found to be desirable had been unlawfully conducted. On two occasions AFL was enjoined from handling government shipments which were not incidental to farm-related movements. Subsequently, it was held to be in contemptuous violation of the injunctive orders. Also, Congress amended 49 U.S.C. 303(b)(5), effective July 26, 1968, among other things, limiting a cooperative's nonfarm-related transportation to fifteen per cent of total tonnage.

Numerous existing carriers protested the application. It was denied by the Commission's Temporary Authorities Board. However, Division 1, acting in its appellate capacity, overruled the Board and granted the application by order dated September 3, 1968. The original plaintiffs below filed complaint alleging the order was unlawful and void in that the Commission failed to comply, and failed

to require AFL to comply, with its temporary authority rules. They also filed motion for an order to stay the going into effect of said order. Pursuant to an extended hearing —the government at that time vouched for the validity of the Division's order—the lower court entered its order staying the order of September 3 "pending a determination by this Court of the issues of this proceeding, or until the further order of the Court."

Without obtaining leave of the court, Division 1 reopened the Commission's proceeding, received the verified statement of DOD's Vincent F. Caputo, and, by order of December 19, 1968, again granted the application.

These Railroad Appellees timely filed a motion to strike the Caputo statement on the ground the district court had assumed jurisdiction of the subject matter and that, in any event, it failed to meet minimum requirements of the rules even if considered together with the initial statement. The motion was never ruled upon expressly.

Some appellees filed petitions for reconsideration of the order of December 19.

A supplemental complaint was filed in the district court. It was therein contended that the second order was in contravention of the jurisdiction of the court and not in compliance with the Commission's rules. A stay was requested and granted.

On the merits, the court held that the order of September 3 (now conceded to be deficient) was void for lack of compliance with the implementing rules, that because jurisdiction had vested in and had been exercised by the court the Commission lacked authority to enter its order of December 19, and, in addition, the Caputo statement did not meet the minimum requirements of the rules. The court may have

additionally concluded (A. 398a) that the Commission could not grant the application in view of AFL's failure even to allege facts satisfying the conditions imposed by 49 U.S.C. 310a(a).

DOD has at no time urged urgent or immediate need. It admits there is already capable carrier service. It concedes it can make no contention that available service is insufficient or inadequate. Thus, the application does not fall within the ambit of the statute, for its purpose is not to enable the provision of service for which there is an immediate and urgent need where there is no carrier service capable of meeting such need.

Further, it does not comply with the requirements of the Commission's rules. It does not square with the Commission's definition of "immediate and urgent need." Its complete, single-line service concept is rejected by the rules as ground for temporary authority. And, both of its supporting statements fail to meet minimum evidentiary requirements. While appellants contend they should not be required to comply literally with rules prescribing minimum information required to be specified in supporting statements, a contention which flies in the face of the language employed by the Commission, they make no attempt whatsoever to explain away the failure to comply with the equally important provisions just noted above.

The Commission's rules have the same force and effect as law and are subject to the same tests as statutes. They are as binding upon the Commission as the public. If this Court finds they were applicable and were violated, the case is ended. *Service* v. *Dulles,* 354 U.S. 363.

The lower court's alternative holding also should be affirmed. When the Commission's Division 1 acted as an appellate division, as it did, the administrative process was

ended. This is made clear even by the Commission's own rules of procedure. 49 C.F.R. 1100.101(a)(2) and 1131.6(a). The Commission had no power, without leave of the court below, to reopen its proceeding and to act inconsistently with the court's jurisdiction. *Inland Steel Co.* v. *U.S.*, 306 U.S. 153. No such leave was asked or given.

ARGUMENT

1. The Purported Support Fails To Satisfy The Commission's Own Rules Governing Filing, Processing And Determination Of Temporary Applications Or Either Of The Two Conditions Imposed By The Underlying Statute, Especially In View Of The Admission There Is Already Sufficient And Adequate Service.

The Motor Carrier Act of 1935, 49 U.S.C. 301 et seq., made no provision for issuance of temporary operating authorities. The Commission found it was powerless to deal with emergency situations. In a letter to both houses on February 25, 1938 (Sen. Doc. No. 154, 75th Cong., 3rd Series, pp. 2-3), its Chairman requested such authority because:

> "Cases arise, and have been brought to our attention, where *urgent need* for interstate motor carrier service *suddenly develops.* The *bringing in of oil wells in a new field* and conditions created by a flood or other *calamitous visitation* are good examples, and there are others." (Emphasis added.)

Congress thereupon enacted 49 U.S.C. 310a(a), giving the Commission power to grant temporary authority to enable the provision of service for which there is immediate and urgent need, but only where there is no carrier service capable of meeting such immediate and urgent need.

In 1964, the Commission instituted a rule-making proceeding to determine whether implementing rules and regulations should be prescribed to *govern* the filing, processing and determination of applications for temporary authority. In 1965, rules were adopted. *Ex Parte No. MC-67, Motor Carrier Temporary Authorities,* 98 M.C.C. 483, 49 C.F.R. 1131, et seq.

As will be shown, the adopted rules were couched in mandatory terms requiring strict compliance and interpretation. Contentions that it did not really mean what it plainly said have been renounced by the Commission itself.

At Page 39 of the *Seventy-ninth Annual Report of the Interstate Commerce Commission* submitted December 31, 1965, it was said:

> "••• The rules *require* more complete information to be furnished by carriers and shippers, and set forth *minimum standards of proof necessary for a grant of authority.* •••" (Emphasis added.)

And, on January 23, 1968 the Commission issued a policy release, 2 CCH Fed.Car.Rep. ¶23114, in which it was stated in part:

> "Requests for temporary authority to conduct regulated motor carrier service will be *turned down* if the applications do not adequately comply with Interstate Commerce Commission rules. •••" (Emphasis supplied.)

The implementing rules and regulations clearly were calculated to insure adherence to the conditions imposed by the underlying statute and the legislative history. In part, they provide (all emphasis added):

> "240.4(b) [49 C.F.R. 1131.4(b)] *Standards for determination*—The following standards *shall* be used •••.

"(2) *Immediate and urgent need.*—An immediate and urgent need justifying a grant of temporary authority will be determined to exist *only* where it is established that there is or soon will be an *immediate* transportation need which *reasonably* cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination *not presently served* by carriers, a discontinuance of existing service, *failure of existing carriers to provide service,* or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed.

• • •

"(4) *Single-line service*—Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service *will not warant* a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized *only* when it is clearly established that the carriers providing multiple-line service are not capable of, *or have failed in,* meeting the *reasonable immediate and urgent needs* of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

"(5) *Complete service.*—Requests for temporary authority on the basis of 'providing a complete service to a shipper,' even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper *in their authorized territories,* or that the supporting shipper *has revised its distribution methods* to such an extent that there actually is an immediate and urgent need for the complete service proposed."

• • •

Rule 240.2(c) [49 C.F.R. 1131.2(c)] provides:

> *"Supporting statements.*—Each application for temporary authority *must* be accompanied by a supporting statement(s) designed to establish an *immediate* and *urgent* need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense *must* contain a certification of its accuracy and *must* be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement *must* contain *at least* the following information:
>
> • • •
>
> "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."
>
> • • •

In the face of the clear provisos and requirements of the statute and its implementing rules as noted above, appellant AFL, an agricultural cooperative association,[1] applied for

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[1] Until AFL applied to the district court for stay of its order pending appeal, there was no suggestion that it intended to assume common carrier status and at the same time, with the same equipment, operate under the agricultural cooperative exemption. The questionable legality of such a proposal thus is not at issue. However, on November 18, 1969 an Interstate Commerce Commission hearing examiner concluded that such an operation would be repugnant to the public interest, contrary to the National Transportation Policy, and in violation of 49 U.S.C. 303(b)(5). Docket MC-133250 (Sub 2), *United Agricultural Transportation Association of America Marketing Co-Op Application.*

temporary authority (A. 10a) to transport every conceivable commodity when moving on government bills of lading between all points within broad areas, on the theory there is now no *one* existing carrier authorized to render *complete, single-line* service between *all* combinations of the thousands of points involved.

The sole supporting shipper is DOD, which submitted a supporting letter.

The Commission also had before it letters of DOD stating that while the continuation of AFL's service was considered desirable,[3] DOD was not in position to represent that there would be insufficient or inadequate service without it. (A. 11a; A. 13a; A. 393a).

A large number of existing carriers protested. In their Protest (A. 127a) these Railroad Appellees pointed out noncompliance with the provisions of the pertinent statute and the implementing rules, that the deficiences in the supporting letter deprived them of their right guaranteed by the rules to make a specific showing of their capabilities,

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[3] Much of the service desired to be continued was unlawful. In two proceedings in which appellant Commission intervened on the side of plaintiffs, AFL was enjoined from conducting general hauling for the government which had no incidental relationship to its farm-related purpose. *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, Civil Nos. 67-487 and 68-148 (W.D. Okla., February 20, and May 28, 1968), affirmed *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 415 F. 2d 747 (10th Cir. 1969). Later, plaintiffs alleged the injunctions had been violated. The district court agreed. It was concluded, among other things, that AFL's primary concern was the government, not cooperative membership traffic. *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 303 F. Supp. 1078 (W.D. Okla. 1969), appeal docketed.

and that the Oklahoma injunctions precluded a finding of fitness.[3]

The application was denied by ICC's Temporary Authorities Board.

AFL filed petition for reconsideration and the Commission's Division 1, acting as an appellate division, purportedly granted the application by order dated September 3, 1968. (A. 143a). The Solicitor General does not contend that this order was valid. (Br. pp. 3, 15, 27).

On September 26, 1968, nine regulated motor carriers and an association of carriers[4] filed their complaint in the United States District Court for the Western District of Washington, Southern Division. It was therein alleged that the Order of September 3, 1968 was beyond the lawful authority of ICC and was wholly unlawful and void in that the Commission failed to comply, and failed to require AFL to comply, with its formally promulgated rules prescribing minimum standards relating to the filing, processing and determination of temporary authority applications. (A. 149a). This was the sole issue presented. At the same time, they filed motion for an order to stay the going into effect of said order. The motion was argued before Judge George Boldt on October 2, 1968.[5] He entered a stay order (A.166a).

On November 5, 1968 the Commission's Division 1, again acting as an appellate division, reopened the proceeding

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[3] Fitness of the applicant is an issue. 49 C.F.R. 1131.4(b)(8)(ii). Neither of the granting orders hereinafter referred to made a finding relating to AFL's fitness.

[4] Additional motor carriers and the railroad appellees later became intervening plaintiffs.

[5] Although the government now concedes the order was deficient, it vigorously resisted stay on the ground the order was valid (A. 159a).

(A. 170a), and, on December 19, 1968, it again granted the same authority, in the same proceeding, after receiving the verified statement of Vincent F. Caputo, Director for Transportation and Warehousing Policy, DOD (A. 194a).

On December 31, 1968 plaintiffs below filed in the district court their supplemental complaint (A. 371a) in which the only issues raised (A. 373a) were whether the order of December 19 was unlawful by reason of being in contravention of the jurisdiction of the lower court and not in compliance with the implementing rules and regulations. A motion to stay also was filed.

Issuance of the temporary authority was again stayed (A. 383a), and after hearing on the merits, the 3-judge court filed its Opinion and Judgment on March 26, 1969 (A. 388a). The court held (1) that the order of September 3, 1968 was void for lack of compliance with the rules, (2) that inasmuch as the court assumed and retained jurisdiction of the controversy, the Commission was without authority to issue its purported order of December 19, 1968, and, (3) in any event, the Caputo verified statement did not meet the standards and minimum requirements prescribed by the implementing rules.

The court may have additionally concluded (A. 398a) that a grant of this application would exceed the Commissions' authority due to failure of the application to satisfy either of the conditions imposed by the statute. Whether or not the court intended to express such a view, it is axiomatic that implementing rules have no application if the terms of the underlying statute have not been met.

Appellants concede (Solicitor General's Br. p. 16; AFL Br. p. 21) that the Commission did not fully comply with its rules. They admit that the Caputo statement did not supply required information, but take the position there

was substantial or reasonable compliance, that strict compliance is not necessary, and that appellees have suffered no prejudice.

As pointed out in their protest (A. 127a) and motion to strike the Caputo statement (A. 363a), these appellees were highly prejudiced in their efforts to protect their traffic. They were denied the right guaranteed them by 49 C.F.R. 1131.3(a)(2) to make a specific showing of their carrier capabilities. It was impossible for them to answer DOD's broad and vague generalities with specificity. Further, they have been prejudiced by loss of tonnage to one granted temporary authority in defiance of governing rules.

No claim has been made that there is lack of carrier service. It is only contended that there is no single carrier authorized to render a *complete, single-line* service between every point within a nine-state area, on the one hand, and, on the other, every point within a five-state area. But, the Commission's standards for determination, *supra*, do not contemplate temporary authorizations of those types of services.[8] There is no showing that DOD is faced with "a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service [or] failure of existing carriers to provide service". Further, there has been no contention that there is an *immediate* need or an *urgent* need of the service proposed. There is no allegation that existing carriers cannot *reasonably* meet DOD's requirements. These standards of determination, ignored by appellants in their Briefs, have been wantonly violated. There is no assertion they have been complied with reasonably, substantially, or at all. In fact,

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[8] Significantly, the district court took note of the rule regarding single-line service. 49 C.F.R. 1131.4(b)(4). (A. 394a).

Appellants' Questions Presented[7] on this issue are limited to the sufficiency of the information required by 49 C.F.R. 1131.2(c).

Rules and regulations promulgated by the Commission pursuant to statutory authority have the force and effect of law, and concededly are subject to the same tests as statutes. *Atwood's Transport Lines* v. *U.S.*, 211 F. Supp. 168, 170, affirmed per cur., 373 U.S. 377. Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and this principle holds even when the considered administrative action is discretionary in nature. *Service* v. *Dulles*, 354 U.S. 363; U.S. ex rel. *Accardi* v. *Shaughnessy*, 347 U.S. 260.

In *Service* this court said (372):

> "**** *Second*, petitioner contends that the Secretary's action is subject to attack under the principles established by this Court's decision in United States, ex rel. *Accardi* v. *Shaughnessy*, 347 U.S. 260, namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature.*** *Since, for reasons discussed hereafter, we have concluded that petitioner's second contention must be sustained, we do not reach the first.*
>
> "The questions to which we address ourselves therefore are as follows: (1) Were the departmental Regulations here involved applicable to discharges effected under the McCarran Rider? and (2) Were those Regulations violated in this instance? We do not understand the respondents to dispute that the principle of United States ex rel. *Accardi* v. *Shaughnessy* (US) *supra*, is controlling, if we find that the Regulations were indeed applicable and were violated. We might also add that

[7] Solicitor General's Brief, page 3; AFL's Brief page 3.

we are not here concerned in any wise with the merits of the Secretary's action in terminating the petitioner's employment." (Emphasis ours.)

The rules, as above shown, are couched in terms of command. In both its annual report and policy release, *supra*, the Commission made it clear this was no accident. The rules and regulations are binding upon the Commission, and the district court correctly so concluded.

Appellants rely upon four decisions to support their contentions that the rules may be disregarded. In *Roadway*[8] no question relating to them was raised before the Commission, and the reviewing court deemed the point to be waived. In *Estes*,[9] the decision in *Acme Cartage Co.* v. *U.S.*, 290 F. Supp. 453, which was relied upon in great measure by the lower court in the instant proceeding, was distinguished on the facts. In *Superior*,[10] both *Acme* and the instant case were distinguished on the facts. In *Bell*,[11] the court found that many of the supporting letters responded to every requirement. These cases do not help appellants.

If the lower court concluded (A. 398a) that neither condition in the underlying statute, 49 U.S.C. 310a(a), has been met, its holding was correct. The statute provides that the Commission may grant temporary authority to enable the provision of service where there is an immediate and urgent need therefor, and where the points or areas involved are without service capable of meeting the immediate and

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[8] *Roadway Express, Inc.* v. *U.S.*, 263 F. Supp. 154.

[9] *Estes Express Lines* v. *U.S.*, 292 F. Supp. 842, affirmed per cur., 392 U.S. 718.

[10] *Superior Trucking Co.* v. *U.S.*, 1969 CCH Fed.Car.Cas. ¶82108.

[11] *Bell Lines* v. *United States*, 1 CCH Fed.Car.Rep. (1969 Fed.Car.Cas. ¶82139) (S.D. W.Va. 1969), *appeal docketed*, No. 893, 1969 Term.

urgent need. No lack of service is claimed. On the contrary, as seen, DOD frankly admitted it was not in position to state that there would be *insufficient* or *inadequate* service without AFL. No grant is here required "to enable the provision of service" because sufficient and adequate service concededly is already available. And, as mentioned above, there is no allegation relating to immediate need, urgent need or emergency. Consequently, the Commission did not have before it an application to enable the provision of service for which there is an immediate and urgent need where there is no capable carrier service.

2. The Commission Lacked Authority To Reopen Its Proceeding And Act Inconsistently With The Reviewing Court's Jurisdiction Without Leave Of The Court.

On October 2, 1968, Judge George Boldt entered an order (A. 166a) staying the order of the Commission's Division 1, acting as an appellate division, of September 3, 1969 *"pending a determination by this Court of the issues of this proceeding, or until the further order of the Court"*. (Emphasis supplied).

After recognizing the action of the district court and staying its order of September 3 (A. 169a) the Commission's Division 1, again acting as an appellate division, reopened the proceeding as to precisely the same issue as was being judicially reviewed (A. 170a). The verified statement of Vincent F. Caputo (A. 194a), was received, and Division 1, again acting as an appellate division, by order of December 19, 1968, again granted the authority (A. 367a).

Meanwhile, on November 12, 1968, seven days *after* the Commission had purportedly reopened its proceeding, it filed in the district court its motion to stay further proceedings therein (A. 167a). However, no action was ever taken to note the motion for hearing or otherwise to pro-

cure the stay sought (A. 392a). That is the reason the motion, as stated at page 7 of the Solicitor General's Brief, "never came on for hearing".

While some appellees replied to the Caputo statement, these Railroad Appellees moved to strike it (A. 363a), pointing out that the district court had assumed jurisdiction of the subject matter, and that whether considered separately or in concert with DOD's initial statement, it failed to meet minimum requirements and the standard of determination of the Commission's implementing rules and regulations. The motion to strike has never expressly been ruled upon.

Some appellees filed petitions to reconsider or stay the order of December 19. However, the administrative proceeding had already terminated.

The Commission's temporary authorities rules of procedure permit petitions for reconsideration to be directed *only* at orders of the Temporary Authorities Board and of Division 1 *initially* granting or denying applications. 49 C.F.R. 1131.6(a)[12]. Appellants' contentions that the Commission's general rules of practice should take precedence over the special rule applying only to temporary authorities collide with the rule of construction that specific terms shall prevail over general terms in the same or another statute which otherwise might control. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228. Thus, when Division 1 acted as an *appellate* body, as it did in

[12] "*Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person."

promulgating its order of September 3, the administrative function was at an end. This is further evidenced by the fact that the Commission's General Rules of Practice, 49 C.F.R. 1100.101(a)(2)[13], provide that orders of a division in any proceeding shall be considered administratively final, except those declared to involve an issue of general transportation importance, those wherein the *initial* decision is rendered by a division, or those wherein a division reverses, changes or modifies a decision by a *hearing officer*. As noted by the court below (A. 396a), the disposition of an application by a Board does not constitute a hearing before a hearing officer. *Trans-American Freight Lines, Inc.* v. *U.S.*, 258 F. Supp. 910 (1966).

Under its own rules of proceedure, issuance of the order of September 3, 1968, completed the administrative process. The district court properly accepted and exercised jurisdiction to judicially review the assailed order. Pursuant to an extended hearing (A. 159a; 395a) the court stayed the purported order pending its determination of the issues or until the further order of the court. No such further order was made. The Commission, *after* its purported reopening, filed its motion for stay of the court's order, but never bothered to note it for argument.

Subsequent actions of the Commission, in addition to being unauthorized by its own rules, were taken without leave and in defiance of the lower court's order of October 2, 1968. This, it could not lawfully do. The lower court so held (A. 395a).

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[13] "All decisions, orders or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division.***"

The Solicitor General (Br. 23-26) and AFL (Br. 39-41) hinge their arguments on the notion that the Commission was free to act because the administrative proceeding had not been completed due to the filing by some appellees of petitions for reconsideration. But, under rules promulgated by the Commission itself, such petitions could not be entertained, and no further Commission proceedings could be had after Division 1 had acted as an appellate division.

The Solicitor General concedes, citing *Inland Steel Co. v. U.S.*, 306 U.S. 153, (Br. 26) that the Commission could not act in a manner inconsistent with the jurisdiction of the court. Yet, that is precisely what it did. It attempted to reassert its jurisdiction and reopen its proceeding as to the same issue as was being judicially reviewed without obtaining leave of the reviewing court which had stayed the assailed order "pending a determination by this Court of the issues of this proceeding, or until the further order of the Court."

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

Ed White
280 Union Station Building
517 West Adams Street
Chicago, Illinois 60606
Attorney for Railroad Appellees

February, 1970.

CERTIFICATE OF SERVICE

I, Ed White, a member of the Bar of this Court, hereby certify that copies of the foregoing Brief of Railroad Appellees have been served by me this second day of February, 1970 on all parties required to be served by mailing copies thereof by air mail, postage prepaid as follows:

Hon. Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530

Robert W. Ginnane, Esq.
General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

Joseph A. Califano, Jr., Esq., and
John D. Hawke, Jr., Esq.
Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Peter T. Beardsley, Esq. and
Nelson J. Cooney, Esq.
1616 P Street, N.W.
Washington, D. C. 20036

William H. Dempsey, Jr., Esq.,
Peter A. Hornbostel, Esq., and
Mark L. Evans, Esq.
734 Fifteenth Street, N.W.
Washington, D. C. 20005

Richard W. McLaren, Esq.,
James van R. Springer, Esq.,
John H. D. Wigger, Esq., and
W. Richard Haddad, Esq.
Department of Justice
Washington, D. C. 20530

Arthur J. Cerra, Esq.
Associate General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

William L. Peterson, Jr., Esq., and
James M. Robinson, Esq.
Hanson, Fisher, Tumilty,
Peterson & Tompkins
401 North Hudson, Suite 200
Oklahoma City, Oklahoma 73101

William B. Adams, Esq.
624 Pacific Building
Portland, Oregon 97204

Robert E. Joyner, Esq.
2111 Sterick Building
Memphis, Tennessee 38103

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Ed White

APPENDIX

NAMES OF RAILROAD APPELLEES

The Atchison, Topeka and Santa Fe Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago and North Western Railway Company
Chicago, Burlington and Quincy Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Colorado and Southern Railway Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Fort Dodge, Des Moines and Southern Railway Company
Fort Worth and Denver Railway Company
Great Northern Railway Company
Green Bay and Western Railway Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Terminal Railroad Company
The Kansas City Southern Railway Company
Missouri-Kansas-Texas Railroad
Missouri Pacific Railroad Company
Norfolk and Western Railway Company
Northern Pacific Railway
St. Louis-San Francisco Railway Company
Soo Line Railroad Company
The Texas and Pacific Railway Company
Toledo, Peoria and Western Railroad Company
Union Pacific Railroad
Waterloo Railroad